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Turner in the Trenches: A Study of How Turner v. Rogers Affected Child Support Contempt Proceedings

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**TURNER IN THE TRENCHES:
A STUDY OF HOW *TURNER V. ROGERS* AFFECTED
CHILD SUPPORT CONTEMPT PROCEEDINGS**

Elizabeth G. Patterson*

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* Professor, University of South Carolina School of Law. Professor Patterson was Director of the South Carolina Department of Social Services from 1999 through 2003. The author wishes to acknowledge a particular debt to Bryan Lysell, who as a student participated in the design and implementation of the initial observational study in 2010, as well as the subsequent data analysis. Thanks are also due to Stephen Sutherland and James K. Mossman, who spent many hours observing contempt hearings and talking with court personnel in 2013 and 2016. © 2017, Elizabeth G. Patterson.

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I. INTRODUCTION

On April 4, 2015, Walter Scott was shot to death while running from a policeman in North Charleston, South Carolina.¹ It was one of a series of police shootings of black men that grabbed the nation's attention in the spring and summer of 2015.² In Walter Scott's case, the incident focused attention not only on law enforcement officers' use of excessive force, but also on a second, less visible issue that clouds the lives of many low-income men and some women³—the difficulty of staying current with their child support obligations and the potential jail time if they fail.

Many persons wondered why Scott ran from a police officer who pulled him over for something as minor as a broken tail light. Family members opined that he was probably afraid of being jailed again for delinquent child support payments.⁴ At the time of the shooting, Scott was the subject of an outstanding order to appear before a family court judge and explain his failure to make the mandated payments.⁵ If found to be willfully noncompliant, he could have been held in contempt of court and incarcerated, as happens to hundreds of noncustodial fathers in South Carolina, many of whom are low-income and without permanent employment.⁶ Scott's flight may have been motivated by a fear that he would be jailed even if his delinquency were merely a reflection of a lack of resources. Many observers believe that such a fear would be well justified, though until recently there has been little evidence one way or the other.

Beginning in 2009, researchers at the University of South Carolina (USC) School of Law conducted a series of inquiries aimed at examining the extent to which indigent child support obligors are being jailed on account of their inability to pay court-ordered support. During this same period the U.S. Supreme Court heard and decided the case of *Turner v. Rogers*,⁷ a South Carolina case concerning the procedural rights of child support obligors in civil contempt proceedings that could result in incarceration.

1. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

2. See, e.g., Sandhya Sonashekhar et al., *Black and Unarmed*, WASH. POST, (Aug. 8, 2015), <http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/>.

3. Since the vast majority of child support obligors are men, masculine pronouns will be used when referring to obligors or contemnors.

4. Schmidt & Apuzzo, *supra* note 1. Another law enforcement shooting of a fleeing child support obligor is described in *Henry v. Purnell*, 652 F.3d 524 (4th Cir. 2011).

5. Lauren Sausser, *Walter Scott Dogged by System that "Criminalizes" Debt*, POST & COURIER (Apr. 9, 2015), http://www.postandcourier.com/news/walter-scott-dogged-by-system-that-criminalizes-debt/article_e211c5c9-c6ba-5ded-a92e-a2fc363d179c.html.

6. *Id.*

7. *Turner v. Rogers*, 564 U.S. 431 (2011).

Prior to the decision in *Turner*, the researchers conducted a study in which 326 South Carolina child support contempt hearings were observed to assess the quality of the decision-making on the “ability to pay” issue. The study, presented in an amicus curiae brief filed in *Turner*,⁸ indicated that the practices and procedures used in those hearings resulted in incarceration of large numbers of child support obligors who lacked the ability to make their child support payments and who would not be able to pay the purge amounts necessary to secure their release. The following year the Supreme Court held in *Turner* that the proceedings in Mr. Turner’s contempt hearing, which were in most respects typical of the hearings observed in the study, violated the obligor’s right to due process of law.⁹

In the wake of *Turner*, courts and child support agencies throughout the country modified their child support contempt procedures, and judges became more sensitized to the constitutional implications of their handling of these cases. Because of their earlier court observation study, the USC researchers saw a unique opportunity to assess the effects of the *Turner* opinion on the processes and outcomes of child support contempt proceedings at the local level. Taking advantage of this opportunity, they conducted a second court observation study in 2013, two years after the *Turner* decision, which replicated the earlier study both in methodology and location. The study was partially repeated once more in 2016 to confirm that practice remained consistent with the 2013 observations.¹⁰

This article will examine and compare the findings of these studies to identify direct and indirect effects of the *Turner* decision on child support contempt proceedings in South Carolina. It will also offer insight regarding the mechanisms by which Supreme Court mandates become incorporated into practice. Initially, Part II will explain the legal context of the hearings that were observed, with particular attention to the mandates of the Supreme Court’s decision in *Turner v. Rogers*, which was decided between the two sets of hearings. Part III will describe findings of the study concerning procedural matters, such as duration of hearings, representation by counsel, and roles of the judge, the child support agency, and the custodial parent. Part IV presents findings related to the outcomes of the hearings. It will address the central questions of whether child support obligors who lacked the ability to pay were nonetheless being found in contempt and incarcerated, and whether the *Turner* ruling affected these outcomes. Part V examines the ways and means by which changes in judicial practice were brought about in the wake of *Turner*, primarily the federal and state administrative response to the decision, and changes in judicial awareness of what is at stake at child support contempt proceedings. Part VI takes this analysis one step further by assessing the likelihood that new regulations issued by the federal Office of Child Support Enforcement (OCSE) in 2017 will further alter the conduct or outcome of these hearings.

8. Brief of Elizabeth G. Patterson et. al as Amici Curiae in Support of Petitioner, *Turner v. Rogers*, 564 U.S. 431 (2011) (No. 10-10), 2011 WL 141223, at *5–22.

9. *Turner*, 564 U.S. at 449.

10. In 2016, hearings in only five of the original thirteen counties were observed.

II. BACKGROUND

A. *Contempt of Court in Child Support Enforcement Cases*

The proceedings examined by the USC researchers were family court hearings to determine whether an individual should be held in contempt of court for disobeying the court's order to make certain child support payments. Courts have inherent power to hold in contempt persons who flaunt the authority of the court by defying an order issued by the court.¹¹ A finding of contempt based on non-compliance with a court order requires a showing that the individual's violation of the order was willful—that is, the individual knew of the order and was able to comply, but nevertheless failed to do so.¹²

Contempt of court is a crime and may be prosecuted as such. However, in the child support enforcement system, contempt usually proceeds as a civil rather than a criminal matter. In a civil contempt action, the object is not to punish the alleged contemnor,¹³ but rather to induce compliance with the court order.¹⁴ In a criminal contempt proceeding the defendant must be afforded the full panoply of procedural protections guaranteed by the constitution to criminal defendants, including the requirement of proof beyond a reasonable doubt, the right to counsel, and the privilege against self-incrimination.¹⁵ These procedural protections are not available to an alleged contemnor in a civil proceeding, even though a civil contempt proceeding may result in incarceration of the contemnor.¹⁶

Because of its ameliorative nature, incarceration for civil contempt is conditional and terminates upon the contemnor's performance of the action ordered by the court, be it production of a document, provision of testimony, or payment of money. The contemnor's compliance is said to "purge the contempt," and the condition of release is referred to as the "purge condition." Incarceration for civil contempt is permissible only if the purge condition is an act which the contemnor has the ability to perform. Otherwise, it is spurious to claim that the incarceration is conditional or ameliorative rather than punitive and, hence, criminal.¹⁷ In the case of a child support contemnor for whom the purge condition requires the payment of money, civil incarceration is thus permissible only if the contemnor has the ability to pay the purge amount.

In child support contempt proceedings, therefore, the obligor's ability to pay is a central issue in two different respects. First, ability to pay is necessary to a

11. See Elizabeth G. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J. L. & PUB. POL'Y 95, 101–02 (2008).

12. See *id.* at 116.

13. Because the proceedings discussed herein are civil rather than criminal, the person charged is not referred to as the "defendant," but rather as the "contemnor" (generally used to refer to a person who has been held in contempt) or the "obligor" (generally used to refer to a person who is subject to a child support order but who has not yet been held in contempt). See S.C. CODE ANN. §63-17-720 (2008) (definition of "obligor").

14. See Patterson, *supra* note 11, at 102–03.

15. *Id.* at 103.

16. See *id.*

17. *Id.* at 104; see also *Turner v. Rogers*, 564 U.S. 431, 445 (2011). If the proceeding were deemed to be criminal in nature, the alleged contemnor would be entitled to all of the procedural protections afforded to other criminal defendants.

finding that the obligor is in contempt. If the obligor lacked the ability to pay the amount due, his nonpayment was not willful and, hence, not in contempt of the court's order.¹⁸ Second, even if the obligor had the means to pay at some time prior to the hearing but failed to do so, and thus is properly held in contempt, he cannot in a civil proceeding be imprisoned on account of that contempt, unless at the time of sentencing he has the present ability to pay the amount set by the court as the purge amount. The purge amount may be either the full amount of the arrearage¹⁹ or a lesser amount at the discretion of the court. In either case, it must be an amount that the contemnor has the present ability to pay, such that his incarceration legitimately can be characterized as conditional, or coercive, rather than punitive.²⁰

B. U.S. Supreme Court Decision in Turner v. Rogers

In *Turner v. Rogers*,²¹ the petitioner argued that a child support obligor should have the right to appointed counsel in a civil contempt proceeding that could result in his incarceration. Turner, an indigent resident of Pickens County, South Carolina, had been ordered in 2003 to make weekly child support payments in the amount of \$51.73.²² Over the next three years, Turner repeatedly failed to pay and was held in contempt on six different occasions.²³ At the sixth hearing, which resulted in the petition to the Supreme Court, Turner testified to a struggle with drugs and a disabling work injury that impaired his ability to pay.²⁴ With no further evidence, the judge held Turner in contempt and sentenced him to a twelve-month jail term which could be purged by payment of \$5,728.76 (the full amount of the arrearage) plus any additional support payments that accrued while he was incarcerated.²⁵ The judge made no finding on whether Turner had the ability to make the delinquent support payments or to pay the purge that would enable him to avoid the jail sentence.²⁶

With the assistance of pro bono counsel, Turner appealed this sentence, alleging that the failure to provide him with counsel for the contempt hearing constituted a violation of due process.²⁷ The Supreme Court declined to recognize a right to appointed counsel in child support contempt proceedings, at least in proceedings such as Turner's where the opposing party was a custodial parent who

18. Patterson, *supra* note 11, at 104–05. In civil contempt proceedings the issue of “ability to pay” is usually treated as a defense rather than as part of the state’s case in chief. In a typical civil contempt proceeding, therefore, the state need only prove the existence of a valid order and the alleged contemnor’s violation thereof.

19. The term “arrearage” refers to the amount of past-due child support that is owed by a contemnor. S.C. CODE ANN. §63-17-720(1) (2008).

20. Patterson, *supra* note 11, at 104. A proceeding that results in punitive incarceration is criminal in nature, and is thus constitutional only if the obligor has been afforded all of the procedural protections required by the constitution in a criminal trial. *See, e.g., Turner*, 564 U.S. at 445.

21. *Turner*, 564 U.S. at 438.

22. *Id.* at 436.

23. *Id.* at 436–38.

24. *Id.* at 437.

25. *Id.*

26. *Id.* at 437–38.

27. *Id.* at 438.

also was unrepresented by counsel.²⁸ Nonetheless, the Court found that the proceedings by which Turner was deprived of his liberty violated his due process rights, because they failed to adequately assure an accurate determination on the key issue of “ability to pay.”²⁹

The Court held that as an alternative to providing counsel, the state could satisfy due process by utilizing alternative safeguards capable of significantly reducing the risk of an erroneous determination of ability to pay.³⁰ The Court approved but did not mandate a set of alternative safeguards suggested by the federal government: adequate notice to the obligor of the importance of the “ability to pay” issue, a fair opportunity to present—and to dispute—relevant information, and specific court findings regarding “ability to pay.”³¹ Because Turner had received neither counsel nor the benefit of sufficient alternative procedures, the Court held that his incarceration violated the Due Process Clause.³²

C. South Carolina Studies of Contemnors’ Ability to Pay

The South Carolina research focused on the key issue identified in *Turner*: the adequacy of South Carolina’s contempt proceedings to assure an accurate determination of “ability to pay.” The researchers sought to assess the likelihood that child support obligors who lacked the ability to pay were nonetheless being found in contempt and incarcerated. Their investigations looked at (1) the number of child support obligors who were actually imprisoned in South Carolina on a typical day in 2005 and again in 2009; (2) the characteristics of obligors appearing before the court in child support contempt proceedings in 2010 and 2013, and (3) the processes and evidence on which those courts based their findings concerning “ability to pay.” Hearings were observed before and after the 2011 decision in *Turner*.

Jail Surveys. Initially, surveys of South Carolina jails were conducted to determine the number of persons incarcerated on contempt charges based on a failure to pay court-ordered support. Two surveys conducted in 2005 and 2009 revealed that on a typical day South Carolina’s jails held over 1800 family court contemnors, constituting 14–16% of the total jail population.³³ These numbers

28. *Id.* at 448. The Court expressly left open the question of whether a right to counsel would arise in civil contempt proceedings where the opposing party was the state rather than an unrepresented noncustodial parent. *Id.* at 449. The Court’s distinction was based on its concern to avoid “asymmetries of representation” that would affect the overall fairness of the proceedings. *Id.* at 447. Such an asymmetry—not present if neither party was represented, as the Court construed the situation in *Turner*—would arise if the state with its ample supply of legal counsel were the opposing party. Quoting an earlier decision, the Court stated, “[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.” *Id.* at 449 (emphasis and modifications in original).

29. *Id.*

30. *Id.* at 447–48.

31. *Id.* at 448.

32. *Id.* at 449.

33. For each of these surveys, a letter explaining the project was sent to county sheriffs by the South Carolina Sheriffs Association, together with a response form asking for the number of child support obligors being held in the county jail and the total jail population, on a particular date. The information was sought from non-responders to the initial survey through follow-up telephone calls. In all, data was received from 31 of the state’s 46 counties in 2005 and 36 counties in 2009. There were only three small

strongly suggested that large numbers of indigent persons were being incarcerated for civil contempt in proceedings arising from nonpayment of support.

Several aspects of the child support enforcement system made it unlikely that persons with the ability to pay were spending time in jail on account of nonpayment, or if so, then for no more than a few days. Most importantly, the contempt process is only one of a variety of tools available for collecting delinquent child support, and it is generally considered a last resort.³⁴ More productive tools include a wide array of mechanisms for seizing the obligor's wages and other assets, as well as coercive measures such as cancellation of various sorts of licenses, such as driver's, hunting or fishing, and professional, and passport denial.³⁵ Payment from obligors who have the means to comply with the court order usually can be obtained through the use of these tools. If persons with the ability to pay do fall prey to the contempt process, either the threat of jail or the first few days of incarceration are generally sufficient to induce payment. Thus, persons with the means to pay are unlikely to make up a significant portion of the population of incarcerated contemnors at any given time.

Court Observation Studies. To test the hypothesis that large numbers of indigent obligors were being incarcerated for nonpayment of support despite their inability to pay, and to acquire information about the process by which their incarceration occurred, the USC researchers undertook an observational study of child support contempt proceedings in South Carolina family courts. The study was conducted over a two-month period in the summer of 2010. One day of hearings was observed in each of thirteen counties,³⁶ a total of 326 hearings. The subject counties represent a cross-section of the state, selected on the basis of geographical region, population density, racial composition, average income level, and judicial district.

The holding in *Turner*, issued subsequent to this initial court observation study,³⁷ raised awareness of the rights of persons incarcerated in civil contempt proceedings. It also generated considerable conversation among the various participants in the child support enforcement system and led to changes in agency policy at both federal and state levels. However, the extent to which court

counties from which no information was received in either year. For the counties from which data was received in only one of the two studies, an estimate has been made for the second year based on the single year's data. The studies were thus able to closely approximate the number of child support obligors being held in jails throughout the state on a typical day in each of the two years, though it should be noted that data from different counties did not represent jail populations on the same day.

34. See, e.g., Response to Comment on Proposed Rule to Procedures to Promote Program Flexibility, Efficiency, and Modernization, 81 Fed. Reg. 93,492; 93,533–34 (Dec. 20, 2016); Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.*, N.Y. TIMES (Apr. 19, 2015), http://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html?_r=3.

35. Patterson, *supra* note 11, at 100; OFFICE OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT HANDBOOK 23–30 (2013), http://www.acf.hhs.gov/sites/default/files/programs/css/child_support_handbook_with_toc.pdf.

36. The counties observed were: Aiken, Anderson, Charleston, Edgefield, Fairfield, Florence, Greenville, Hampton, Horry, Marlboro, Orangeburg, Richland, and Sumter. In South Carolina, family courts hold contempt hearings on designated days in each county, their frequency depending on the size of the caseload in the particular county. Thus, some counties hold weekly child support enforcement hearings, while others set aside only one day each month.

37. Preliminary results of the study were presented to the Court in an amicus brief. See Patterson et al., *supra* note 8, at 3–4.

proceedings changed in the wake of the ruling was difficult to discern because those effects were dispersed among myriad hearings in myriad courtrooms throughout the country.

To assess the effect of *Turner* on contempt hearings in South Carolina, the USC researchers conducted a second observational study in the summer of 2013, returning to the same thirteen family courts that had been observed in the 2010 study. In each of the two studies, the observers gathered data concerning the characteristics of each obligor, hearing procedures and sources of evidence, facts related to individual obligor's ability to pay, and the outcome of each case. Direct observation of the hearings was supplemented by conversations with many of the judges, clerks of court, and other participants in the hearings.

Because of the possibility that proceedings had further evolved while data from the 2010 and 2013 studies were being analyzed, observations of contempt proceedings in five of the thirteen counties were again conducted in the summer of 2016.³⁸ The 2016 observations demonstrated continued incremental movement in the directions observed in 2013 and will be referenced herein.

III. CHILD SUPPORT CONTEMPT HEARINGS IN SOUTH CAROLINA BEFORE AND AFTER *TURNER*

The legal issues in *Turner* centered on process. *Turner*, a child support obligor, argued that failure to provide him with counsel in a proceeding that could result in his incarceration violated the Due Process Clause. The Court recognized the strength of *Turner's* claim, but held that due process did not require the appointment of counsel if alternative procedures were used that were capable of assuring the accuracy of the "ability to pay" determination.³⁹ Thus, the first line of inquiry for the researchers was an examination of the procedures used by the courts and their adequacy for producing accurate determinations of "ability to pay."

A. *Judicial Control of Contempt Proceedings*

The procedural findings from the study can be understood only in the context of South Carolina's distinct process for adjudicating contempt cases in Family Court. The primary mechanism for initiating child support contempt proceedings in South Carolina is Family Court Rule 24, under which the clerks of court automatically rule on any obligor whose account is more than five days in arrears.⁴⁰ Thus, neither the Department of Social Services (DSS), which administers the Child Support Enforcement program in South Carolina, nor the custodial parent is necessarily aware, much less has a voice in deciding, that contempt proceedings should be initiated. Rule 24 makes no provision for the objectives of the child support enforcement program and how they might best be achieved, or for the desires and needs of the custodial parent. It seems to treat nonpayment of child

38. The five counties observed in 2016 were Greenville, Florence, Fairfield, Orangeburg, and Richland. Although all three studies were conducted within the same thirteen counties, there were only three instances in which the same judge was observed in two different years. In all, 27 different judges were observed in the three studies.

39. *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

40. S.C. FAMILY CT. R. 24.

support simply as a wrong against the judiciary and, thus assigns to court personnel the responsibility for initiating corrective proceedings.

Consistent with this model, the proceedings themselves are structured as inquiries by the court to determine whether and how to deal with the apparent affront to judicial authority. The result is a proceeding which is more inquisitional than adversarial in nature.⁴¹

Figure 1. Persons Present at Contempt Hearings in Addition to the Obligor, Judge, and Clerk.

	2010	2013
DSS attorney	327 (100%)	121 (84%)
Attorney for obligor	12 (3.6%)	5 (3.4%)
Custodial parent	38 (11.5%)	60 (42%)

The hearing commences when the clerk or judge instructs the obligor to come forward to the defendant's table.⁴² The plaintiff's table is occupied by agency personnel, generally including an attorney from the South Carolina Department of Social Services (DSS). The custodial parent, if present, is seated in the gallery.⁴³ Though seated at the plaintiff's table, DSS personnel do not structure or control the proceedings. Initially, either the judge or the clerk states the obligor's name and basic information about the case, such as the requirements of the support order, the obligor's payment history, and the total arrears. This information is treated as satisfying the state's initial burden of proof. The judge⁴⁴ then questions the obligor, typically beginning with some form of the question, "Why haven't you paid?" The obligor responds to that question and to any others the judge might pose. Occasionally, the DSS attorney interjects a contradiction or confirmation of something that the obligor has said, a statement of how DSS wishes the court to proceed, or a question directed to the court or the obligor. More often than not, however, the judge alone interrogates the obligor. Once the judge has finished this inquiry a custodial parent, if present, is allowed to speak. At the conclusion of the hearing, the judge issues an oral ruling, which is memorialized on a pre-printed form with blanks filled in by the judge, the clerk, or the DSS attorney.⁴⁵

These proceedings are more inquisitional than adversarial not only because of the dominant role of the judge in framing the issues and questioning the obligor and other persons, but also because of the largely passive role of the DSS attorney, the near-universal absence of counsel for the obligor, and the peripheral role of the

41. An adversarial system, the model on which both civil and criminal trials in the United States are based, "vests decision making authority, both as to law and fact, in a neutral decision maker who is to render a decision in light of the materials presented by the adversary parties." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.4(c) (3d ed. 2000). In contrast, in an inquisition the court assumes the dominant role in developing and presenting evidence at trial. *Id.* The judge in an inquisition also may play a dominant role in assembling the facts on which charges are based and initiating the proceeding. *Id.* This characteristic is reflected in the role of the clerk of court in South Carolina child support contempt cases.

42. Only in rare cases is the obligor accompanied by an attorney. *See* Figure 1.

43. Custodial parents are present only in a minority of Rule 24 cases. *See* Figure 1.

44. On rare occasions, the DSS attorney may conduct all or part of the questioning of the obligor.

45. A copy of the written order is provided to the obligor. In some cases, obligors found in contempt are immediately handcuffed and led out of the courtroom. In others, implementation of the sentence is delayed. *See infra* pp. 91–92, regarding postponed sentences.

custodial parent, as described above. Whereas the adversary system is characterized by the adversaries' marshalling of evidence on the salient facts for presentation to the judge, in the inquisitional model the judge is the person most responsible for ferreting out key facts. in the inquisitional model.⁴⁶

The Supreme Court treated the proceedings in the *Turner* case as if they followed the adversarial model, rather than recognizing the important ways in which South Carolina's contempt proceedings differ from that model. Its ruling against a right to counsel for child support obligors in civil contempt proceedings was based in part on a notion of preserving an even playing field between the custodial parent and the noncustodial parent who the Court regarded as contesting parties in an adversary proceeding.⁴⁷ Although the proceedings observed by the USC researchers included a few private child support cases that fit this model, the overwhelming majority of the child support cases observed in 2010, 2013, and 2016 were state-initiated and state-conducted as described above, with the state and the obligor as de facto contesting parties.

B. Representation by Counsel

The Supreme Court stated in *Turner* that a right to counsel might be constitutionally required if the state, rather than the non-custodial parent, were the opposing party.⁴⁸ Although the hearings in South Carolina would appear to fit this criterion, obligors are not provided with court-appointed attorneys, and the proportion of obligors who were represented at the hearings was a mere 3.4% in both 2010 and 2013.

Figure 2. Legal Representation.

	2010	2013
Obligor had attorney at hearing	11 (3.4%)	5 (3.4%)
Outcome		
Contempt	2	—
No Contempt	6	3
Continuance	3	2

Almost all of these attorneys were also representing the obligor in some other matter related to the obligor's ability or obligation to pay support, such as a disability claim, a custody proceeding, or a proceeding to modify the support order.

46. In the 2010 hearings, DSS did not present evidence concerning the obligor's circumstances. The information on which the judge's decision was based was derived from the interchange at the hearing together with information in the case file maintained by the court. That file would normally be limited to the obligor's payment history and information concerning previous contempt proceedings. In 2013, the judge might also have information gathered by DSS personnel in connection with the pre-screening process, which would typically include financial and other pertinent information concerning the obligor's circumstances and case history. *See infra* p. 103–05, concerning the screening process instituted statewide in response to an action transmittal issued by the federal Office of Child Support Enforcement in 2012.

47. *Turner v. Rogers*, 564 U.S. 431, 447 (2011). One of the reasons given by the Court for denying a noncustodial parent's right to appointed counsel in civil contempt proceedings was its concern that doing so would create an "asymmetry of representation" between custodial and noncustodial parents, whom the Court viewed as the opposing parties in *Turner's* case.

48. *Id.* at 449.

Our observations showed that cases in which a key issue of this sort is awaiting determination in another proceeding generally result in a continuance or a ruling of no contempt in any event, provided the obligor presents credible verification of the other proceeding.⁴⁹ Consequently, representation by counsel in these contempt cases may have had little effect other than to verify the existence of the other proceeding and assure that appropriate documentation was provided to the judge. On the other hand, obligors were rarely represented in the much larger array of cases where the role of an attorney would be to assure correct determination of the “ability to pay” issue.⁵⁰

C. Managing the Number and Variety of Cases Generated by Rule 24

Rule 24 results in a large number of rules to show cause that were being issued every month, with no consideration of factors other than nonpayment.⁵¹ In 2010, almost all of these cases were heard by a judge.⁵² Thus, the 2010 hearings necessarily included persons in a wide variety of circumstances related to their obligation to pay support and their past, present, and future ability to do so. Typical circumstances included the following:

- An obligor who had paid regularly until a recent job loss;
- An obligor who was unemployed for a year or more, either receiving or not receiving unemployment compensation, and had not paid during some or all of that period;
- An obligor who was paying less than the full amount ordered because the child support award had been set at an unreasonably high level;
- An obligor who received a disabling injury and was awaiting the outcome of a worker’s compensation case or an application for disability benefits;
- An obligor who stopped paying during a period of unemployment but recently obtained a new job;
- An obligor who was contesting paternity of the child; or
- An obligor who had been giving money or goods directly to the custodial parent rather than paying through the court.
- One obligor might have appeared to be doing the best he could, while another had funds available but used them for other expenses, including support of other children and family members.

49. See generally *infra* Figure 3.

50. A larger proportion of obligors in the five counties observed in 2016 were represented by counsel. However, the issues and outcomes in those cases were no different from what is described here in regard to 2010 and 2013.

51. See *supra* pp. 82. A bench warrant is issued for those who fail to appear in response to the Rule.

52. Two of the counties observed in 2010 had pre-screening processes of the sort later adopted statewide, see *infra* pp.103–05, which resulted in settlement of some cases without a hearing before the judge.

In 2010, these and other variations resulted in a large number of no-contempt rulings⁵³ and a large number of continuances⁵⁴ due to the lack of substantive screening before those cases were submitted to a judge.

Figure 3. Continuances.

	2010	2013
Number of Continuances	47	30
% of Obligor	14%	21%
Duration of Continuances		
One month or less	12	11
More than one month	24	15
indefinite/unclear	11	4
Reasons for Continuances		
Produce document/information	13	8
Await results of another proceeding	18	13
Obligor incarcerated	1	2
Other	15	7

Beginning in 2013, a process of administrative screening and settlement was in place that diverted from the judicial docket cases in which the agency and the obligor could agree to a settlement (e.g., a payment schedule, an application for disability or other benefits, job search activities, or initiation of proceedings to modify the child support award).⁵⁵ This change resulted in a substantial reduction in the number of cases coming before the judge, from 327 in 2010 to 143 in 2013. As a result, judges were less likely to hear cases in which a contempt ruling was clearly unwarranted.

D. Summary of Findings Related to Procedure

The constitutional wrong that the *Turner* Court attempted to correct was the wrongful incarceration of civil contemnors who lacked the ability to comply with the support order or with the purge on which incarceration was conditioned. The remedy decreed by *Turner* was a procedural one: to implement procedures capable of assuring an accurate determination on the “ability to pay” issue.

The adequacy for this purpose of the observed procedures was a primary focus of the study. Findings relevant to this issue, summarized below, identify limited procedural improvements in the post-Turner hearings.

Attorneys. Attorneys for the obligors were rarely present in either 2010 or 2013 and almost never in cases where “ability to pay” would have been the decisive issue. Thus, the assurance of accuracy on this issue had to come from other sources.

Alternative Procedural Protections Approved in *Turner*. The South Carolina court system appears to have chosen the alternative procedures approved by the

53. In 2010, 52% of the cases on which the court ruled resulted in a finding of no-contempt.

54. Continuances, which postpone a ruling in the case until a later date, were generally used in cases in which the court was unable to rule on the contempt issue without further information. As shown in *supra* Figure 3, this information usually involved documentary verification of the obligor’s claims or the results of another proceeding.

55. See *infra* pp. 103–05.

Supreme Court as its method for assuring the unrepresented obligor an accurate decision on the “ability to pay” issue. However, the implementation of the alternative procedures appeared somewhat half-hearted at the time of the 2013 hearings.⁵⁶ The only significant change seen in 2013 was the longer hearing duration, which created the opportunity for a more extensive interchange between the judge and the obligor.⁵⁷

Administrative Pre-Screening. The most important change in court procedure in 2013 was a by-product of the new statewide pre-screening procedure that was implemented in response to Action Transmittal 12-01.⁵⁸ That change was, of course, the decrease in the number of judicial hearings and the concomitant increase in the duration of each hearing. Without the increased time, the judge would not have been able to engage in the more extensive questioning observed in 2013 or to review the written record and any financial statements that might be available.

Adequacy to Assure Accurate Determinations of Ability to Pay. Other than the increase in the hearing duration, no new procedures were observed in 2013 that had the potential to improve the accuracy of decisions regarding ability to pay. While the increased hearing time did make it possible in 2013 for the judges to obtain sufficient information to accurately make these determinations, as the following section demonstrates, this did not guarantee an appropriate outcome.

IV. OUTCOMES BEFORE AND AFTER *TURNER*

Although the specific issue in *Turner* was procedural, the ruling focused on the importance of avoiding a specific outcome; the incarceration of child support obligors who lacked the ability to make the court-ordered payments on which their physical liberty hinged. Thus, the second line of inquiry for the researchers was an examination of the outcomes of the hearings and how those outcomes were, or were not, affected by the economic circumstances of the affected obligors. The findings in this area support the conclusion that both before and after *Turner*, substantial numbers of child support obligors were being held in contempt and incarcerated despite their questionable ability to make the required payments. In reaching this conclusion, the researchers examined data concerning contempt rulings, sentencing practices, and purge conditions. Racial demographics were also analyzed to determine whether outcomes in particular cases appeared to be affected by the race of the obligor.

A. Contempt Rulings

In the 2010 hearings, 41% of all obligors coming before the court were held in contempt. If we count only cases in which the judge ruled on the contempt issue,⁵⁹

56. See *infra* pp. 100–02.

57. See *infra* Figure 11.

58. See *infra* pp. 103–05.

59. For this calculation, cases resulting in continuances are excluded.

the proportion held in contempt was 48%, versus 52% who were found not to be in contempt. Almost all of those held in contempt were given a jail sentence.⁶⁰

Figure 4. Outcomes of Contempt Hearings.

	2010	2013
Number of Obligor	327	143
Contempt rulings	134	73
Percent of cases	41%	51%
Percent of rulings*	48%	65%
No-contempt rulings	146	40
Percent of cases	45%	28%
Percent of rulings	52%	35%
Continuances	47	30
Percent of cases	15%	21%

* Percent of rulings is based on those cases that resulted in a ruling of contempt or no-contempt, and does not include cases that were continued.

Three years later, after the *Turner* decision, the proportion of hearings resulting in a contempt ruling was 51%, or 65% of cases in which the court ruled on the contempt issue. All contemnors were given a jail sentence. Findings from the more limited 2016 study were almost identical, with contempt holdings in 49% of cases and 65% of rulings.

The increase in the proportion of contempt rulings in 2013 and 2016 may seem surprising, since implementation of *Turner's* directive to hold in contempt only those who had the ability to pay at the time of noncompliance should have resulted in a reduction in contempt holdings. However, the increase in the proportion of contempt rulings must be viewed with reference to the new screening procedure that had been put in place subsequent to *Turner*.⁶¹ It would be expected that a screening procedure would remove from the court docket more cases that would have resulted in a ruling of no contempt than those that would have resulted in a ruling of contempt. Thus, assuming that the same number of obligors appeared in response to Rules to Show Cause in each of the two years, the number of judicial hearings should be smaller in 2013, and the proportion of judicial hearings resulting in a contempt ruling should be greater even if the number of contempt rulings was the same. A more meaningful comparison of outcomes in the two years can thus be made by looking at the number of contempt rulings rather than the proportion of rulings in which the obligor was held in contempt. This comparison does show a reduction in the number of obligors who were held in contempt—from 134 in 2010 to 73 in 2013, a decrease of 46%.⁶² Therefore, of all the obligors

60. The court declined to impose a jail sentence in only two of the cases in which an obligor was held in contempt. See *infra* Figure 6.

61. This process provided that obligors who were ruled in by the clerk pursuant to Rule 24 would meet first with representatives of the child support enforcement agency to see if a settlement could be agreed upon. If so, no judicial hearing would be held. For more information about the screening process, see *infra* pp. 103–05.

62. The 2016 data, if adjusted to account for the smaller number of counties, give a contempt figure that is quite similar to the 2013 count.

who were summoned to appear before the court, the number held in contempt decreased by almost half.

There are several possible explanations for this decrease.⁶³ The most likely explanations, both of which probably played a part, are (1) that judges' greater awareness of the "ability to pay" issue resulted in fewer contempt holdings, and (2) that some portion of the cases settled through the pre-screening process would have resulted in contempt rulings had they gone before the court.

B. Contempt and Ability to Pay the Court-Ordered Support

The key question for purposes of this analysis is how many of these obligors who were held in contempt had been unable to make the court-ordered support payments such that their nonpayment was not willful and, therefore, not in contempt of the court. To estimate the number of obligors who were held in contempt despite their inability to pay, unemployment⁶⁴ was used as a proxy for being impoverished.⁶⁵ Unemployment at the time of nonpayment, and the resulting lack of income, was treated as an indication that nonpayment was not willful. Obligor who had been unemployed at the time of nonpayment of the support order were identified based on statements made during the hearings.

Of those held in contempt in 2010, 69% had been unemployed at the time of nonpayment and hence unlikely to have had sufficient means to make the ordered payments.⁶⁶ This proportion slightly increased in 2013, when 73% of contemnors were unemployed at the time of nonpayment.⁶⁷

63. It is possible that there were fewer non-paying obligors in 2013 than had been the case in 2010. It is also possible that the number of obligors who had been unable to pay the court-ordered support, or whose non-payment was non-willful for some other reason, was greater in 2013. However, there was no evidence in the hearings themselves or in the researchers' discussions with court personnel to support either of these hypotheses.

64. Categories from Figure 4 that are included in the "unemployed" category are extended unemployment, sporadic/marginal unemployment, gap in employment, recent job loss, and jail/recent jail.

65. Although not all unemployed persons are impoverished, it is likely that all of the unemployed obligors appearing before the court in these cases were quite poor, since most earned low wages even when employed. On the other hand, the commonality of very low wages among the obligors appearing in these cases suggests that inability to pay was not limited to those who were unemployed. Although unemployment is an imperfect proxy for poverty, it is used herein because it was a piece of information usually revealed during the hearings, and because unemployment is closely correlated with poverty in the low-wage population that dominated the observed hearings.

66. That obligors were being held in contempt despite their inability to pay was acknowledged by one judge, who stated to the researcher who observed his hearings, "Most people here are probably telling the truth that they can't pay. There's a lot of unemployment down here." This judge held 80% of obligors in contempt despite the county's 14.1% unemployment rate.

67. Looked at from a different perspective, the data show that in 2010, 68% of unemployed obligors were held in contempt, and this figure rose to 75% in 2013. See *infra* Figure 5.

Figure 5. Obligor's Economic Circumstances at Time of Nonpayment.*

	2010				2013		
	Contempt	Non-Contempt	Total		Contempt	Non-Contempt	Total
Extended Unemployment	58	16	74		19	9	28
Sporadic/Marginal Employment	4	3	7		11	3	14
Gap in Employment	12	10	22		5	2	7
Reduction in Hours**	8	8	16		3	—	3
Recent Job Loss	2	6	8		5	1	6
Disabled/Pending Claim	4	14	18		2	3	5
Employed	9	25	34		3	8	11
Jail/Recent Jail	13	7	20		12	2	14
Unclear	24	17	41		13	3	16
Non-Economic Basis for Ruling	—	40	40		—	9	9
Total	134	146	280		73	40	113

* Only cases on which the court ruled are included.

** Includes reduced hours, decrease in business, change in basis for pay (e.g., from salary to commission).

Figure 5a: Non-Economic Circumstances Affecting Non-Contempt Rulings.

	2010	2013
Some or all arrears forgiven	5	2
Paid up on day of hearing	7	3
Administrative error re delinquency or amount	3	—
Change in custody/minority status of child/paternity	18	2
Interstate issue	6	—
Extraneous legal issue	—	2
Modification pending	1	—

These figures demonstrate that although the number of contempt rulings had declined dramatically in 2013, courts were continuing to hold in contempt large numbers of obligors whose nonpayment was not willful because they lacked the ability to comply with the support order.⁶⁸ All of these contemnors received jail sentences.

68. In 2010 and 2013, the statewide unemployment rate in South Carolina exceeded the national average—in some counties, by a large margin. See *Economy at a Glance—South Carolina*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/eag/eag.sc.htm> (last visited November 8, 2017). In 2010, at the heart of the Great Recession, when the national unemployment rate was 9.6%, South Carolina's unemployment rate stood at 11.2%, and the unemployment rates in individual counties included in the study

C. Sentencing of Contemnors

All but two contemnors were given a jail sentence, with both of these exceptions occurring in 2010. However, in a substantial proportion of cases the court ordered that implementation of the jail sentence be delayed.⁶⁹ In fact, in 2013 just over half of contemnors received delayed sentences. Delayed implementation of sentences took two different forms.⁷⁰ One form, which will be referred to as “postponed” sentences, involved brief delays to allow the contemnor to come up with money for the purge before commencement of the jail sentence.⁷¹ The other form of delayed sentence deferred incarceration for a longer period contingent on the contemnor’s compliance with a condition such as staying current with child support payments or participating in a fatherhood program.⁷² Sentences of the latter sort are similar to the suspended sentences used in criminal cases and will be referred to herein as “suspended” sentences.⁷³

ranged as high as 19.4%. In the county with 19.4% unemployment, the court made a finding of willful nonpayment in 79% of the cases that were observed. Nationally, the unemployment rate had fallen to 7.4% by 2013, and the statewide rate was only slightly higher at 7.6%. The unemployment rates in more than half of the observed counties, however, exceeded the state and national averages, ranging as high as 12.9%. In three of the four counties with the highest unemployment rates, more than 60% of obligors appearing before the court were held in contempt in 2013..

69. *See supra* Figure 5.

70. The two forms of delayed implementation that are discussed here are the author’s characterizations of the sentences handed down by the courts observed in the study. They are not formal categories drawn from South Carolina law.

71. For purposes of numerical analysis, delays of 30 days or under are treated as postponed sentences unless the form of the sentence dictates otherwise.

72. Fatherhood programs were more widely available in 2013 than in 2010, though at that time they were still not available statewide. Judges in two of the 13 counties mentioned to the USC researcher their need for a fatherhood program.

73. The fact that an obligor whose sentence is suspended avoids incarceration at the time of sentencing does not render the question of “ability to pay” nugatory in future proceedings. If incarceration is later considered, due to the contemnor’s violation of a condition on which the suspension was based, “ability to pay” again becomes an issue. At no time can a civil contemnor be incarcerated without a current determination of his ability to pay a purge. *See e.g.*, Hicks v. Feiock, 485 U.S. 624, 638 n.8 (1988); Shillitani v. United States, 384 U.S. 364, 371 (1966); Patterson, *supra* note 11, at 104. In fact, the passage of time since the original contempt ruling increases the possibility that the contemnor’s ability to pay a purge may have changed since entry of the suspended sentence. Some family court judges seemed confused on this point. In one 2013 case, for instance, the judge found that the contemnor did not have the ability to make child support payments that came due following his release from jail several months earlier and thus held him not to be in contempt in the current proceeding. However, because the obligor had not totally complied with a condition attached to an earlier suspended sentence imposed by a different judge, the judge said he had no choice but to activate the suspended sentence. Thus the obligor was jailed despite the judge’s finding that he lacked the ability to pay a purge at the time of incarceration. This mistake may have its roots in the criminal court version of a suspended sentence, which can be automatically activated upon noncompliance with the attached conditions. However, criminal sentences are punitive, not coercive, and hence not constitutionally limited by a requirement that the defendant have the ability at the time of incarceration to comply with a condition imposed by the court. Thus, the two situations are not legally comparable. In fact, one judge whose hearings were observed in 2013 stated to the researcher that she abjured the use of the term “suspended sentence” in order to avoid any confusion that might arise from its association with the criminal justice system.

Figure 6: Delayed Sentences.

	2010	2013
Held in Contempt	134	73
Sentence Immediately Implemented	86 (64%)	34 (47%)
Sentence Postponed	19 (14%)	12 (16%)
Sentence Suspended	27 (20%)	27 (37%)
No Sentence	2 (1%)	0 (0%)

Implementation was delayed in 34% of the jail sentences handed down in 2010. Of these, almost 60% were suspended, and the rest were postponed. In 2013 the proportion of sentences that were delayed had jumped to 53%, of which almost 70% were suspended. The proportion of contemnors whose jail sentences were immediately implemented, which had been 64% in 2010, had dropped to 47% in 2013.⁷⁴ Thus, as many as 53% of the 2013 contemnors may have been able to avoid incarceration altogether depending on whether they complied with the conditions attached to their sentences.⁷⁵ Because most of the delayed sentences were conditioned on a payment of money, it is likely that many indigent contemnors receiving these sentences were unable to comply and ultimately ended up in jail.

D. Purge Conditions and Ability to Pay

The purge condition, fulfillment of which enables the contemnor to avoid or end his jail term, is the most important element of a civil contempt sentence. The “civil” characterization of civil contempt procedures derives from the contemnor’s ability to bring his incarceration to an end by complying with a purge condition set by the court.⁷⁶ In a child support contempt proceeding, this condition will typically involve payment of some or all of the child support owed.⁷⁷ Because the constitutionality of the sentence depends on the contemnor’s ability to comply with it and thus avoid or end his incarceration,⁷⁸ the amount of the required payment must reflect the resources available to the contemnor at the time he is jailed or threatened with jail.

Because of the emphasis placed on the “ability to pay” issue by the *Turner* Court,⁷⁹ it was expected that ability to pay would receive increased attention in the sentencing phase of subsequent child support contempt proceedings. In the hearings observed for this study, this expectation was borne out by an increase in questions from the bench concerning contemnors’ current financial circumstances.

74. See *supra* Figure 6. The proportion of contemnors whose sentences were immediately implemented was only 27% in the more limited 2016 study.

75. The nature of this study did not allow for collection of information about the frequency with which the recipients of delayed sentences were ultimately incarcerated.

76. See *Poston v. Poston*, 502 S.E.2d 86, 88–89 (S.C. 1998).

77. Monetary conditions attached to delayed or suspended sentences are similar in effect, as payment is the only thing that stands between the contemnor and the jailhouse.

78. See *Turner v. Rogers*, 564 U.S. 431, 445 (2011).

79. *Id.* If a sentence is to be implemented immediately, the relevant time is the time of the hearing. With a postponed or suspended sentence, the relevant time is such time as incarceration is contemplated on account of the contemnor’s violation of the condition on which delayed implementation of the sentence was based. In regard to contemnors’ financial circumstances at the time of the hearing, see *infra* Figure 7.

Despite this increased attention, the purges themselves looked only marginally different from those imposed in 2010. The average purge in 2013 was \$1137, slightly reduced from the average of \$1145 in 2010.⁸⁰ In addition, the range of purge amounts was narrower in 2013, when the highest purge was set at \$4500; purge amounts in 2010 could be as much as \$10,000 or more. It was also less common in 2013 for courts to use the full amount of a high arrearage as the purge amount. On the other hand, in 2010 sixteen percent of purges were in the lowest bracket of \$250 or less, while in 2013 only 5% of purges were set at this level.⁸¹

Figure 7. Contemnors' Circumstances at Time of Hearing.

	2010						2013				
	Jail	Post- poned	Susp- ended	No Sentence	Total		Jail	Post- poned	Susp- ended	No Sentence	Total
Unemployed	26	1	5	0	32		11	4	6	—	21
Sporadic Employment	2	1	0	0	3		3	0	1	—	4
Marginal Employment	3	0	1	0	4		3	1	0	—	4
Recent Job Loss	1	0	0	0	1		1	1	1	—	3
Reduced Hours*	7	1	1	0	9		1	1	0	—	2
Employed	4	5	4	1	14		4	3	8	—	15
New Job	17	4	14	1	36		3	2	3	—	8
In Jail	1	0	0	0	1		1	0	1	—	2
Recent Jail	3	1	1	0	5		1	1	2	—	4
Disabled	6	0	0	0	6		2	0	2	—	4
Unclear	16	6	1	0	23		4	0	2	—	6
Total	86	19	27	2	134		34	13	26	—	73

* Includes reduced hours, decrease in business, or change in basis of pay (e.g., from salary to commission)

In assessing the likely ability of impoverished contemnors to pay these purges, unemployment was once again used as a proxy for poverty,⁸² though for this analysis we are looking at contemnors' employment situation at the time of the hearing rather than at the time of nonpayment.⁸³ This is because the relevant time for assessing a contemnor's ability to pay the purge and thereby avoid incarceration is the time at which the jail sentence is to be implemented. The purge is set at the hearing, and it is at or after the hearing that it must be paid if

80. A much lower average of \$761 was seen among the five counties studied in 2016.

81. In the five counties observed in 2016, 2 out of 22 monetary purges, or 9%, were less than \$250.

82. As was true in assessing the willfulness of nonpayment, unemployment status only captures the most destitute of the contemnors. Many persons who are employed or have other income streams are nonetheless poor, and may well be unable to pay a purge set by the court—depending, of course, on the size of the required purge.

83. For this purpose, "unemployed" encompasses the following categories from Figure 7: chronically unemployed, sporadically employed, marginally employed, recent job loss, jail, and recent jail.

incarceration is to be ended or avoided. Thus, in assessing the contemnor's ability to pay the purge, we look at his resources at the time of the hearing.⁸⁴

In 2010, 34% of contemnors were unemployed, and this number increased to 52% in 2013. All of these contemnors received a jail sentence, even though a large proportion could not reasonably be expected to have sufficient funds to pay a purge of any amount.⁸⁵

The constitutionality of these coercive sentences depends on the reasonableness of the purge conditions on which avoidance of incarceration depended. The fact of unemployment does not necessarily signal an inability to pay any purge at all. Some unemployed contemnors are able to pay a limited amount, due to their receipt of unemployment compensation, disability benefits, "under the table" earnings, or sale of real or personal property.⁸⁶ However, the size of the purges set by the courts in 2013 leave considerable doubt whether they were at a level that unemployed contemnors would be able to pay.⁸⁷ Although 52% of contemnors were unemployed at the time of sentencing in that year, only 18% of purges were less than \$500.⁸⁸ Further, based on the distribution of purge amounts shown in Figure 8, a number of purges equal to the number of unemployed contemnors cannot be reached without including purges at the \$500–749 level.⁸⁹

84. The fact that the contemnor had the ability to pay child support at some time in the past, yet failed to do so, is the basis for the finding of contempt. The constitutionality of coercive incarceration, on the other hand, is dependent on the contemnor's ability to avoid or end a jail term by complying with the purge condition at the time when incarceration is imminent or ongoing. *See supra* pp. 78–79.

85. Some judges seemed to believe that the "ability to pay" condition was met if the obligor had a girlfriend or parent who could come up with the money to pay the purge. This is not the case. As stated by OCSE in the commentary to its new regulations, "[I]t is the noncustodial parent, not other relatives, friends, or the custodial parent, who is responsible for child support based upon his or her ability to pay it. A procedure that pressures family members and friends to pay in order to keep the noncustodial parent out of jail is inconsistent with constitutional principles, damaging to family relationships, and ultimately ineffective and counterproductive in obtaining support for children. As a practical matter, reliance on relatives and friends likely will not result in regular support payments for the families." Response to Comment on Proposed Rule to Procedures to Promote Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,534 (Dec. 20, 2016).

86. Also, persons who are sporadically employed or marginally employed (e.g., making a little money by mowing lawns or doing odd jobs) and thus have a small amount of income are included in the "unemployed" category. Judges may conceptualize "ability to pay" as including raising the money from friends or relatives. However, as noted in the comments to the new OCSE regulations, it is both inappropriate and counterproductive to treat the possibility of extracting funds from family or friends as a component of the obligor's ability to pay. *Id.* Similar problems arise when "ability to pay" is construed to include borrowing from professional lenders, including loan sharks. *See infra* note 139.

87. One case illustrates both the knowing imposition of a purge that the contemnor would be unable to pay and the reasoning that can lead to such a result. At a time when the obligor held a managerial position, he had been ordered to pay over \$900 per month in child support. Thereafter, he developed a mental illness, lost his job, and had been in and out of treatment. At the time of the contempt hearing, he was unemployed and homeless. Stating that a \$3000 purge was about as low as she could go on a \$17,000 arrearage, the judge set the purge at \$3000 plus court costs.

88. In 2010, purges under \$500 had constituted 25% of all purges, and 16% of purges were under \$250. Only 5% of purges were less than \$250 in 2013.

89. Figure 8 shows that in 2013 thirteen of the purge conditions that were handed down were non-monetary, and four others were uncertain. If all 17 of the contemnors in these cases were unemployed, this would leave 21 unemployed contemnors who received monetary purge conditions. If the lowest purge amounts shown in Figure 8 were given to these 21 contemnors, some of them would necessarily be subject to purges as high as \$500 to 749. Moreover, since it is unlikely that either of the above assumptions is correct, and there were six additional contemnors who may have been unemployed (employment status

In assessing the reasonableness of these purge amounts, it is useful to consider that an individual who works 40 hours per week at the federal minimum wage of \$7.25 per hour has gross earnings of \$290 per week.

Figure 8. Purge Conditions.

	2010	2013
\$250 or less	23	4
251-499	10	9
500-749	30	13
750-999	10	9
1000-1499	12	7
1500-1999	8	3
2000-2999	7	5
3000-3999	2	4
4000-4999	2	2
5000+	7	—
Fatherhood Program	2	3
Get/stay Current	9	10
Implement Withholding	2	—
Other	2	—
Not Reported	6	4
Total Number of Purges	132	73
Average	\$1145	\$1137

In summary, the data on treatment of impoverished obligors by the courts in 2013⁹⁰ show increased attention to obligors' ability to pay at the time of the hearing and increased use of sentencing mechanisms that had the potential to avoid incarceration. However, the courts in 2013 continued to hold large numbers of chronically impoverished obligors in contempt, with 53% of unemployed contemnors being given immediately effective jail sentences. In fact, 90% of contemnors who were given an immediately effective jail sentence in 2013 were unemployed either at the time of nonpayment, the time of sentencing, or at both these times. Nor did purge amounts in 2013 appear to have moved toward amounts that an impoverished contemnor would have the ability to pay; in fact, the reverse was true.

Thus, despite the Turner Court's admonition that incarceration of a civil contemnor who lacks the ability to comply with the purge condition constitutes a denial of due process, it appears that this prohibited outcome remained common in South Carolina's child support contempt proceedings in 2013.

"uncertain"), it can reasonably be concluded that some unemployed contemnors were ordered to pay even larger purges. Using the same assumptions in 2010, a number of monetary purges equal to the number of unemployed contemnors could be reached at the \$251-499 level. No more than ten of the nonmonetary purges can be attributed to unemployed contemnors, because only 10 unemployed contemnors received delayed sentences in 2010, and non-monetary purges were used only with delayed jail sentences.

90. In 2013, many of the obligors who were ruled in settled their cases through the screening process, and are not reflected in the data herein, since the study was limited to judicial proceedings.

E. Duration of Sentences

Because of the commonality, particularly in 2013, of purges that the low-income obligor would be unable to pay, it is likely that many contemnors, unable to secure release by paying the purge, would be incarcerated for the entire duration of their sentences.

The purpose of a jail sentence in a civil contempt proceeding is to coerce compliance with a court order—in the child support context, an order to make periodic support payments. In essence, the duration of such a sentence could be “until compliance occurs.” However, both statutes and court orders place additional durational limits on the use of incarceration as a coercive tool. The statutory limit in South Carolina is one year.⁹¹ Nonetheless, contempt sentences imposed in the hearings observed in this study were rarely as long as a year. The average sentence in both 2010 and 2013 was approximately three months, though the length of sentences varied considerably, both among counties and among contemnors within a county.⁹² No rationale for the length of particular sentences was enunciated by the judges, and none was inferable from the circumstances.

Figure 9. Duration of Sentences.

	2010	2013
Number of jail sentences	132*	73
Average duration of sentences	90 days	88 days
Sentence durations		
30 days or less	39	16
31-90 days	48	36
91-180 days	38	16
81-365 days	1	1
12+ months	-	1**
Not reported	6	3

* Two contempt rulings resulted in no jail sentence.

** Multiple orders.

The length of a determinate sentence in a civil contempt action should reflect a period of confinement necessary to produce the desired coercive effect. Because of the difficulty of determining this time period with any precision,⁹³ there would be little basis for questioning a particular duration that was consistently applied to all contemnors. However, variations in the sentences given to various contemnors require explanation, since principles of equal protection demand at least a rational basis for such differences in treatment.⁹⁴ It is perhaps for this reason that four of the judges observed in 2010 gave the same sentence to each contemnor, thirty days in one county and six months in the other three.

91. S.C. CODE ANN. § 63-3-620 (2010).

92. The average sentence among the five counties observed in 2016 was somewhat longer, at 3.4 months. The higher average is primarily due to a near-absence of sentences of 30 days or less.

93. Anecdotal evidence suggests that contemnors who have the ability to pay generally tend to do so fairly quickly.

94. See generally, e.g., Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

Even as these judges strove for consistency within their own caseloads, the stark contrast between the 30-day sentences used by one of them and the 6-month sentences used by the other three—seemingly dependent only upon the identity of the judge hearing the case—illustrates the haphazard inequities that are inherent in South Carolina’s sentencing practices. The remaining judges observed in 2010 and all of the judges observed in 2013, varied the sentences given to contemnors appearing before them, with little in the way of articulated or observable rationales for these variations.⁹⁵

The lack of explanation for the length of various sentences is particularly troubling in the many cases where there is reason to doubt that the contemnor will be able to shorten his confinement by paying the purge and will thus be incarcerated for the entire duration of the sentence.

F. Outcomes by Race

The issue of racial disparities was examined as a possible contributing factor to any inappropriate treatment of low-income child support obligors. However, there was little evidence either in the data or in the perceptions of researchers observing the hearings that courts were treating obligors differently based on their race. The number of black obligors appearing before the court was substantially larger than the number of white obligors in both 2010 and 2013.⁹⁶ However, the reasons for this are unclear. Because of the automatic operation of Family Court Rule 24, the process for selecting the obligors who would be summoned to appear before the court does not seem susceptible to discriminatory application.⁹⁷ In 2013, when the pre-screening process was in place, it is possible that some or all of the disparity could have arisen from the manner in which that process was administered, since agency staff played a role in determining which cases were heard by the court. However, many of these decisions were based on objective criteria set by the judge or on the wishes of the custodial or noncustodial parents.⁹⁸ At least part of the explanation for the apparent over-representation of blacks undoubtedly lies in the comparative rates of poverty for the two races. According to 2013 census bureau data, about 27% of South Carolina’s black families lived in poverty, compared to about 9% of white families.⁹⁹

95. One judge told the researcher observing his hearings in 2013 that although his sentences are usually 30–90 days, he sometimes issues a 6-month sentence to a particularly obstinate obligor (presumably someone he has dealt with in previous contempt proceedings, though this may be a reference to the obligor’s attitude during the hearing). This same judge spoke of a retired judge who always issued 12-month sentences, saying that about 80% of contemnors that he sentenced to jail for a year “paid out.”

96. See *infra* Figure 10. This was also true in 2016. Between two and three percent of obligors in 2010 and 2013 were Hispanic or of unknown race. This contingent is shown in Figure 10, but the numbers are too small to allow for meaningful analysis.

97. Regarding Family Court Rule 24, see *supra* p. 82 and *infra* pp. 103–05. It is possible that some other aspect of the child support enforcement program—such as the required participation of welfare recipients, or the development or application of child support guidelines—differentiates by race in a way that plays out in the contempt process. However, any such disparities are beyond the scope of and not discernible by this study.

98. See *infra* pp. 103–04.

99. Alan Blinder & Richard Fausset, *Confederate Flag Down, but Black South Carolinians See Bigger Fights*, N.Y. TIMES (July 20, 2015), <https://www.nytimes.com/2015/07/21/us/confederate-flag-down-but-south-carolina-blacks-see-bigger-fights.html?mcubz=0>.

Figure 10. Race of Obligor.

2010																
	No. of Obligors	Contempt		No Contempt		Continued			Suspended		Postponed		No Sentence		90+ Day Sentence	
Black	220	87	40%	98	45%	35	16%		12	14%	16	18%	1	1%	38	44%
White	98	45	46%	43	44%	10	10%		12	27%	3	7%	1	1%	27	60%
Other/ Un- known	8	2	25%	5	63%	1	13%		1	50%	0	—	0	-		0
Total	326	134		146		46			25	19%	19	14%	2	1%	65	49%
2013																
	No. of Obligors	Contempt		No Contempt		Continued			Suspended		Postponed		No Sentence		90+ Day Sentence	
Black	117	61	52%	33	28%	24	21%		25	41%	12	20%	0	0	33	54%
White	21	9	43%	6	29%	6	29%		5	56%	3	33%	0	0	6	67%
Other/ Un- known	4	3	75%	1	25%	0	—		0	—	1	33%	0	-	2	67%
Total	143	73		40		30			30	41%	16	22%	0	0	41	56%

Data from the court proceedings themselves are indeterminate regarding any possible racially-based differences in treatment of obligors. Several decision points were examined through a racial lens for any signs of disparate treatment, including the contempt decisions themselves, the length of sentences,¹⁰⁰ and the use of postponed and suspended sentences. Data from the 2010 hearings, summarized in Figure 10, give no indication that black obligors were being treated less favorably than white obligors. Indeed, the reverse appears to be true. In cases where the court ruled on the contempt issue, a greater proportion of white than black obligors were held in contempt. Of those held in contempt, a larger proportion of white than black obligors received sentences longer than 90 days. Black and white contemnors received roughly equal proportions of delayed sentences.¹⁰¹

The more recent data diverge on certain points from the trends seen in 2010. In particular, the proportion of contempt rulings given to black obligors exceeded the proportion given to white obligors by a small amount in the 2013 hearings and by a larger amount in the more limited number of hearings observed in 2016. In addition, the data show blacks who were held in contempt in 2013 and 2016 being less likely than whites to have their sentences postponed or suspended.¹⁰² These data should be viewed with caution, however, due to the very small number of white obligors (and to an even greater extent, white contemnors) among the cases

100. The dividing line between short and long sentences was set at 90 days, which was close to the average duration of sentences in both 2010 and 2013.

101. More of the delays for black contemnors were postponements, while more of the delays for white contemnors were suspensions. However, this distinction has no apparent significance for present purposes.

102. The proportion of white contemnors receiving sentences of 90 days or longer was greater in both 2010 and 2013. In 2010, 60% of white contemnors, and 44% of black contemnors, received sentences of 90 days or longer. In 2013, the figures were 67% of white contemnors and 54% of blacks.

that were observed in 2013 and 2016.¹⁰³ In light of the lack of any underlying rationale that would account for an increase in the stringency with which black obligors were treated following *Turner*, the 2013 and 2016 data do not support a conclusion regarding possible change in the even-handed treatment of black and white obligors that was observed in 2010.

G. Summary of Findings Related to Outcomes

These findings address the second and third focal questions of this study: (a) were civil contemnors who lacked the ability to pay the court-ordered support, the purge, or both being incarcerated, and (b) did incarceration of indigent obligors diminish after *Turner* was decided in 2011?

There were some positive findings for obligors generally. The number of obligors held in contempt dropped by almost half. Of those held in contempt, a substantially greater proportion received delayed sentencing, giving them the possibility of avoiding incarceration. The average purge amount dropped slightly, and the maximum purge was substantially lower. Finally, there was no clear evidence that outcomes were influenced by the obligor's race.

However, the obligors on whom the *Turner* decision focused, those who lacked the ability to make the court-ordered payments, appeared to benefit the least from the ameliorative changes observed in the 2013 hearings. The proportion of unemployed obligors who were held in contempt and given a jail sentence was greater in 2013 than it had been in 2010—close to 70% in both years. Nor did relief for indigent obligors come in the form of lower purge amounts that an indigent obligor would more likely be able to pay. In fact, court practices in setting purges in 2013 appear to demonstrate less awareness of the financial limitations of many contemnors than in 2010.

One area of positive change in 2013 was the substantial increase in use of delayed sentences, particularly suspended sentences. However, it is uncertain whether indigent obligors will realize much benefit from this practice. The conditions attached to delayed sentences often involved the payment of money, and there is reason to doubt that an extension of time would enable an unemployed person with few job skills, like many of these contemnors, to generate sufficient funds to meet a monetary condition.

V. MECHANISMS BY WHICH *TURNER* AFFECTED COURT PROCEDURE

A. From the Supreme Court Opinion to the Local Contempt Hearing

Changes in the contempt process and outcomes that were observed in the post-*Turner* hearings may have been directly or indirectly caused by *Turner*, or they

103. In 2013, only 21 of the hearings involved white obligors, and only 9 of these resulted in contempt rulings. Very little can be read into the fact that a smaller percentage of these 21 white obligors were held in contempt and a larger percentage of the 9 white contemnors received postponed sentences. The sample size for blacks in 2013 was considerably larger, with 117 hearings and 61 contempt rulings. In 2016, only 12 hearings involved white obligors, with 5 resulting in a contempt ruling. There were 42 black obligors in 2016, 21 of whom were held in contempt. The 2010 hearings, in comparison, involved 98 white and 220 black obligors.

could have simply co-occurred during the time period within which *Turner* was decided. The data collected was also viewed in the context of legal, regulatory, and other relevant developments to determine how legal mandates handed down by the Supreme Court filter into the practices of persons directly and indirectly affected by the decision.

The *Turner* ruling, for instance, was specifically directed at state and local court systems responsible for the structure and process of child support contempt cases. Those court systems, and specifically the family courts of South Carolina, were ordered to make such adjustments in their formal processes as might be necessary to assure the accuracy of determinations concerning a child support obligor's "ability to pay." These processes-- which might include, e.g., notices, forms, findings, or assistance in preparation-- would be one way for the *Turner* decision to affect local contempt hearings.

A procedural due process ruling such as the one in *Turner* would also affect individual judges' perceptions of how they should manage the hearings over which they preside. Additionally, the contempt proceedings in *Turner* were part of a complex government program with its own legislated objectives, therefore, the agencies charged with administration of that program would normally respond to the decision with programmatic adjustments which could have an indirect effect on the conduct or outcomes of contempt proceedings.

This section will examine how each of these parties responded to the *Turner* decision and how those responses affected the contempt proceedings involving indigent child support obligors.

B. Formal Changes Instituted by the South Carolina Judiciary in Response to Turner

The Court's holding in *Turner* was quite limited in terms of the specific mandates that were placed on courts handling child support contempt cases. Those mandates reflected the Court's perception of contempt proceedings as fitting the traditional adversary model.¹⁰⁴ State-dominated proceedings such as the bulk of South Carolina's child support contempt hearings¹⁰⁵ would seem to require a higher level of due process protection.¹⁰⁶ Nonetheless, the South Carolina court system appears to have treated *Turner* as the measure of what is required in its child support contempt proceedings. The changes made following *Turner* have

104. The Court construed *Turner* as a typical adversary proceeding between a custodial and a non-custodial parent, neither of whom was represented by counsel. *Turner v. Rogers*, 564 U.S. 431, 446–47 (2011). The Court stated that its holding, and particularly its rejection of a right to appointed counsel, would not necessarily apply in cases where the opposing party was the government, with its ample supply of legal and other resources. *Id.* at 449.

105. *See supra* notes 33–38 and accompanying text.

106. *See* Response to Comment on Proposed Rule to Procedures To Promote Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,535 (Dec. 20, 2016) ("Due process safeguards related to contempt actions are particularly important when the noncustodial parent is unrepresented and has limited education and income . . . Additionally, since the noncustodial parent often faces attorneys in court, it is especially important that the State ensures that appropriate procedural safeguards are provided in IV-D cases enforced through contempt proceedings.").

tracked the specific set of procedures approved in *Turner*¹⁰⁷ as a sufficient formal response to the decision. These procedures include:

(1) notice to the defendant that his “ability to pay” is a crucial issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status; and (4) an express finding by the court that the defendant has the ability to pay.¹⁰⁸

This set of procedural safeguards is quite weak; the effectiveness of each measure is dependent on how committed the judge and other court personnel are to assuring the accuracy of the “ability to pay” determination. In fact, these “alternative safeguards” require little more than the procedures already in place in South Carolina prior to *Turner*.¹⁰⁹ For example, the hearings observed in 2010 provided opportunity for the obligor to respond to statements and questions about his financial status, but the nature and quantity of those questions left ample room for erroneous determinations of ability to pay. Similarly, express findings of ability to pay were made in the 2010 hearings by checking a box to that effect on a pre-printed form. No explanation of the basis for this determination was required, and in many cases the information adduced at the hearing did not support such a finding or contradicted it. Thus, compliance with the alternative safeguards required little change in existing practices and held little promise for reducing the improper incarceration of child support contemnors.

Predictably, the formal changes made by South Carolina courts in response to the *Turner* mandate have been modest. Most judges and court personnel who discussed the matter with our researchers said that there had been little or no change in child support contempt proceedings following *Turner*.¹¹⁰

In most counties, notice of the importance of the “ability to pay” issue was confined to a written statement on the back of the service of process form. In only one county was oral notice routinely given to the obligor during the hearing. Similarly, compliance with the second safeguard, “the use of a form (or the equivalent) to elicit financial information,” was limited to a written notice on the back of the service of process form informing the obligor of the opportunity to file a financial statement and providing a web address where such a form could be

107. *Turner*, 564 U.S. at 448. The Supreme Court presents these procedures as an alternative means for satisfying Due Process when counsel is not provided.

108. This set of safeguards was suggested by the federal government appearing as amicus. See Transcript of Oral Argument at 26–27, *Turner v. Rogers*, 564 U.S. 431 (2011) (No. 10-10). The parties’ arguments focused on the right to counsel and did not address whether alternative safeguards might adequately reduce the risk of error and, if so, what those safeguards might be. In adopting the suggested measures put forward by the federal government, the Court relied on the federal government’s “considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders.” *Turner*, 564 U.S. at 446–47. Although the federal government plays a central role in regulating and managing the child support enforcement system through which absent parents are identified and located, support orders are put in place, and support payments are obtained through seizure or coercion, the federal government’s involvement in and awareness of the workings of civil contempt proceedings in the states is actually quite limited.

109. For a description of the contempt hearing in the *Turner* case, see 564 U.S. at 436–38.

110. Those who perceived that change had occurred cited the additional time available for hearings as a result of the pre-screening process, rather than changes in process or outcome of the cases.

accessed.¹¹¹ No evidence was observed at the hearings to indicate that such a form was presented by any obligor or utilized by the judges. Indeed, one judge stated to the researcher that the form was almost never used.¹¹²

The Court's alternative procedures also called for "an express finding by the court that the defendant has the ability to pay."¹¹³ As a general rule, courts observed in the study did not make oral findings regarding the obligor's or contemnor's ability to pay.¹¹⁴ The form for recording civil contempt orders¹¹⁵ contained boxes for checking off whether the obligor did or did not have the ability to pay support, plus a small space for entering the facts on which this conclusion was based. However, there was no similar space for a finding on the contemnor's ability to pay the purge.

The last of the Supreme Court's alternative procedures was "an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form)."¹¹⁶ Such opportunity was at least theoretically available in South Carolina's contempt hearings in 2010 and it remained so in 2013.¹¹⁷ The opportunity was enhanced in 2013 by the increased time available for each hearing.¹¹⁸ Further, the questions asked in 2013 were of a type likely to yield information relevant to determining the obligor's ability to pay, even more so than in 2010.

The direct impact of *Turner* in South Carolina, therefore, was quite small. However, the effects of a Supreme Court opinion often extend far beyond the directives encompassed in the ruling itself. Two mechanisms by which the Court's constitutional rulings effect change are (1) legislative and regulatory changes to conform legal rules and processes with the broader constitutional concepts embodied in the opinion and (2) "consciousness raising" among judges or other persons who modify their perceptions and actions to conform with the principles embodied in the opinion. The greater impact of *Turner* has arisen from these types of indirect effects.

C. Federal and State Administrative Changes in Response to Turner

The most significant changes in South Carolina contempt proceedings following *Turner* are traceable to a new emphasis on screening of potential contempt cases that was initiated by OCSE, the agency that administers the federally funded child support enforcement program. A 2012 Action Transmittal

111. It is worth noting that the financial statement form in use in 2013 was four pages long, and was the same form used in divorce proceedings. In 2016, a new one-page form was adopted specifically for use in child support proceedings.

112. In cases where the agency had pre-screened the case before it was heard by the court, the financial form completed by the agency was available to the court.

113. *Turner*, 564 U.S. at 447–49.

114. Courts in three counties occasionally made oral findings of this sort. One other made explicit findings in some cases that the contempt was "willful," which could be equated with a finding that the obligor had the ability to pay at the time of noncompliance with the support order, but says nothing about his ability to pay the purge. Although the Supreme Court was not clear about which "ability to pay" issue it was addressing, its use of the present tense indicates that it was referring to ability to pay the purge.

115. FORM SCCA 437, S.C. COURTS (July 2011), <https://www.sccourts.org/forms/pdf/SCCA437.pdf>.

116. *Turner*, 564 U.S. at 447–49.

117. *See supra* p. 83.

118. *See infra* pp. 103–05 and Figure 11.

issued by OCSE in response to the *Turner* opinion urged state and local child support agencies to screen nonpayment cases before they were referred for contempt proceedings, as a means for preventing inappropriate incarceration of low-income obligors.¹¹⁹ Pre-screening by the local child support agency was presented as an opportunity to identify obligors whose ability to pay was questionable. It was also an opportunity to develop more constructive and appropriate means for generating the required support, rather than submitting the case for adjudication as contempt.¹²⁰

In South Carolina, most child support contempt hearings are automatically initiated by the court clerk based solely on a five-day delinquency in payment.¹²¹ A pre-screening process had the potential to substantially reduce the number of contempt hearings involving low-income obligors and, hence, the number of improper incarcerations.¹²² However, because of the early and automatic initiation of most contempt proceedings by the clerk, the administrative pre-screening could not function as a process for deciding whether to pursue a contempt action.¹²³ Rather, the pre-screening in such cases was structured to function as a settlement conference¹²⁴ at which the interested parties, generally, the agency, clerk, obligor, and custodial parent, meet and attempt to agree on a plan for achieving consistent support of the child. The obligor's ability to pay, the amount of the support order,

119. OFFICE OF CHILD SUPPORT ENF'T, ACTION TRANSMITTAL 12-01, *TURNER V. ROGERS GUIDANCE* (2012), <https://www.acf.hhs.gov/css/resource/turner-v-rogers-guidance>.

120. *Id.* State and local child support agencies were "urged to screen cases before referring, initiating, or litigating any civil contempt action for non-payment of support that could lead to incarceration, regardless of the role of the IV-D program in the court action." *Id.* § IV.A.

121. Of course, DSS can initiate a contempt proceeding itself, but most contempt actions in South Carolina are initiated by the clerk's office pursuant to Rule 24, particularly those falling within the agency's jurisdiction under Section IV-D of the Social Security Act. Since a ruling to appear before the judge is issued automatically upon the clerk's determining that an obligor is at least 5 days in arrears, there is little or no opportunity for the agency to conduct a screening process or initiate a contempt filing of its own before contempt proceedings are initiated by the clerk.

122. Because incarceration requires an order of the court, a reduction in the number of judicial hearings inherently reduces the number of cases in which incarceration is a potential outcome.

123. Payments of child support are made to and recorded by the clerk of court. *See* S.C. JUDICIAL DEPT., S.C. CLERK OF COURT MANUAL § 7.0 (2014). The clerk thus possesses all information necessary to initiate contempt proceedings under S.C. Family Court Rule 24, and is authorized by that Rule to do so without agency involvement. Specifically, Rule 24, which is entitled "Automatic Enforcement of Child Support and Periodic Alimony," provides:

Determination of Arrearage. Clerks of court shall review all child support and periodic alimony accounts paid through the clerk of court. This review shall be conducted at least once a month. An account shall be considered in arrears if a scheduled payment has not been received when review is made and at least five working days have passed.

Rule to Show Cause and Affidavit. Whenever an account is in arrears, the clerk of court shall issue a rule to show cause and an affidavit identifying the order of the court which requires such payments to be made and the amount of the arrearage, directing the party in arrears to appear in court at a specific time and date. This rule shall have the same force and effect as a rule to show cause issued by a judge.

124. A settlement conference is a meeting between or among opposing parties in a legal dispute at which the parties attempt to reach a mutually agreeable resolution of the dispute without having to submit the matter to a judge for determination. The pre-screening process currently in use statewide in South Carolina replicates a process that was already in use in three South Carolina counties at the time of the 2010 study. Two of the three counties were among those observed by the researchers.

and whether modification of that order is needed are assessed at this meeting.¹²⁵ An agreement among the parties concerning payment schedules, employment-related matters, participation in fatherhood programs, or any other matter is embodied in a consent order and submitted to the judge for approval.¹²⁶

Certain types of cases are not subject to adjustment through the screening or settlement process and must be heard by the court. These include cases in which a bench warrant has issued or in which a party, usually the custodial parent, requests a judicial hearing. Individual courts have added to this list reflecting judges' differing views of the appropriateness and utility of the administrative screening process.¹²⁷ For instance, in one county certain cases involving disability are required to go before the judge. In another, only cases involving Workers Compensation, Social Security claims, or wage withholding are allowed to be resolved without a judicial hearing. Thus, there are notable differences in application of the screening process from one county to another.

The USC researchers observed a reduction of almost 60% in the number of court hearings in the thirteen study counties between 2010 and 2013.¹²⁸ It was estimated by DSS staff in 2013 that approximately 90% of cases statewide were being resolved through the pre-screening process.¹²⁹ The reduction in the number of cases heard by the court meant not only that fewer delinquent obligors were exposed to the threat of incarceration, but also that more time was available for each judicial hearing.

The size of the family court caseload in 2010 created time pressures that all too often resulted in abbreviated hearings in which only cursory consideration was given to the obligor's circumstances.¹³⁰ The average duration of hearings in 2010 was three to four minutes, with few hearings consuming more than six minutes. In 2013, the average duration had increased to almost seven minutes,¹³¹ with almost

125. Interview with Larry McKeown, S.C. Child Support Enf't Program Dir., and other DSS staff (June 18, 2013).

126. Approval from most judges is pro forma. *Id.*

127. One of the attorneys who represented DSS in child support contempt hearings stated to a researcher that some judges feel like pre-screening by the agency is infringing on their turf. On the other hand, one judge stated to a researcher that family court judges should not be serving as debt collectors. He and several other judges stated their dislike for conducting Rules hearings (contempt hearings initiated by a rule to show cause) and their happiness with the pre-screening process.

128. On one hearing day in the thirteen studied counties, 326 child support contempt hearings were held in 2010. In 2013, after implementation of the pre-screening process, the number of hearings held on one hearing day in those same thirteen counties was 145, a 57% reduction.

129. Interview with Larry McKeown, S.C. Child Support Enf't Program Dir., and other DSS staff (June 18, 2013).

130. In one county, for instance, the family court heard twenty-two cases during one morning session. The average length of time for a hearing was two minutes; no hearing lasted longer than three minutes. Eighteen of the twenty-two hearings resulted in a finding of contempt. During the course of those eighteen hearings, the presiding judge asked obligors a total of five questions. Three times the judge asked why an obligor was not paying according to his support order; once he asked if the obligor had a doctor's note; and once he asked how many children the obligor was paying on. In fourteen hearings, the judge asked no questions at all and no one presented testimony to contradict the obligor's claims of inability. Some hearings consisted of one sentence spoken by the obligor followed by a finding of contempt and the issuance of a sentence.

131. The average duration of hearings observed in 2013 was 7.42 minutes, with 76% of hearings lasting longer than five minutes.

15% lasting ten minutes or more.¹³² Judges used the additional time for purposes such as consulting information in the case file, engaging in more in-depth questioning of the obligor concerning his economic circumstances, and sifting through the available information to frame more nuanced dispositions for each case.

Figure 11: Duration of Hearings

	2010	2013
Average duration	3.43 min.	6.78 min.
% longer than 5 minutes	12%	42%
% longer than 10 minutes	2.7%	14%
Longest hearing	20 min.	17 min.
Average duration: range among counties	1.65–7.5 min.	4.68–11.0 min.

The OCSE Action Transmittal thus had important effects on the due process afforded to delinquent child support obligors in South Carolina, expanding significantly on the protection provided by the specific mandates of the *Turner* holding. Both the screening process and the longer hearings played a role in nearly halving the number of contempt rulings between 2010 and 2013 and in bringing about other ameliorative changes discussed above.

D. Effects of Judges' Increased Awareness Following Turner

Prior to the Supreme Court's decision in *Turner*, the beneficent purposes of the child support enforcement program had tended to generate an "end justifies the means" mentality which clouded the importance of assuring that the vast powers of this new endeavor did not trample the liberties of those persons now lumped pejoratively into the category of "deadbeat dads." By highlighting the importance of those liberty interests and embracing them within the ambit of the constitution's due process mandate, the *Turner* Court sent a message to courts and child support administrators that there are limits to the use of the more draconian enforcement techniques and that procedures must be tailored to assuring that those limits are respected.¹³³

As noted, the formal changes instituted by the South Carolina judiciary in response to the *Turner* mandate were quite limited. However, by increasing individual judges' awareness of both constitutional and programmatic implications of the decisions made in child support contempt proceedings, the case had the potential for a much broader impact.

1. Constitutional Constraints

An enhanced awareness of the constitutional significance of child support contempt proceedings was exhibited in the number and nature of the questions

132. The longest hearing observed in 2013 was seventeen minutes.

133. This is similar to the idea that the constitutional rights of criminal defendants must be respected even if doing so allows guilty persons to go free.

asked by judges to the obligor. In 2010, questions tended to be backward-looking, exemplified by the common opening question, “Why didn’t you pay?” They often seemed to be aimed at extracting from the obligor an admission that during the relevant time period he had resources that could have been used for the required child support payments: “Where did you get that watch?” “Do you have a car? How much do you pay for gas?” “You received X dollars from Y—what did you spend it on?” Few questions related to ability to pay a purge. Indeed, judges often seemed unaware that this was an issue separate from ability to make the ordered support payments.

In 2013, judges’ questions were more likely to focus on the obligor’s past and present employment and circumstances such as injury or incarceration that could affect the obligor’s income stream. Questions more often addressed income at both the time when payment was due and at the time of the hearing. More continuances were granted for purposes of gathering additional information on matters ranging from the existence or extent of an obligor’s disability to the living situation of a child or the outcome of a promising job application.¹³⁴ The judges in 2013 thus appeared to be more focused on assuring that their rulings were based on a full understanding of circumstances affecting the obligor’s ability to pay, the issue identified by the Supreme Court as central to due process.¹³⁵

This increased awareness and expanded information gathering may have had the salutary effect of increasing the judges’ understanding of individual obligors’ situations. However, they did not reduce the probability that an indigent obligor would be held in contempt and given a jail sentence, which remained essentially the same in 2013 as it had been in 2010.¹³⁶

2. Child Support Program Objectives

A second area in which increased judicial awareness was observed in 2013 related to the role of contempt proceedings not merely as a remedy for an offense against the court, but as an integral part of the Child Support Enforcement program.¹³⁷ In particular, judges seemed more aware of the programmatic objective of achieving ongoing support for the child. Achieving ongoing support is not simply a matter of extracting past-due payments from obligors. Particularly where the obligor is on shaky financial ground, it requires that remedial actions be tailored in a way that is supportive of the obligor’s long-term capacity to generate income. The inherent counter-productiveness of imposing a jail sentence on an indigent obligor¹³⁸ is multiplied if the sentence results in loss of a job, interruption

134. *See* Figure 3.

135. *See* *Turner v. Rogers*, 564 U.S. 431, 445 (2011).

136. *See* Figures 5 and 7.

137. *See* *Turner*, 564 U.S. at 443 (“Civil contempt proceedings in child support cases constitute one part of a highly complex system designed to assure a noncustodial parent’s regular payment of funds typically necessary for the support of his children.”).

138. *See, e.g.*, Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. 93,492, 93,533 (Dec. 20, 2016). OCSE explains in comments to its new child support enforcement regulations that incarceration

[means that the noncustodial parent loses whatever work he or she may have had, further reducing their ability to pay their child support. Once out, their ability to find work is negatively affected, resulting in some turning to the underground economy, which makes it even more

of the obligor's participation in a program aimed at improving his employability, or resort to desperate measures such as questionable loans that can impair his future economic situation.¹³⁹

Greater attention to long-term concerns such as these was evidenced in the 2013 hearings not only by the extent and nature of the judges' questioning, but also by the nature of the judges' rulings. Comparison of the questions asked by judges in the two study years shows an increasing focus on minimizing future noncompliance and protecting existing income streams. Likewise, courts' rulings in 2013 show a greater tendency to avoid incarcerating contemnors with dependable sources of income.¹⁴⁰

Jail-avoiding outcomes constituted 85% of the dispositions in cases involving employed obligors in 2013, compared with 78% in 2010.¹⁴¹ Only two of the judges observed in 2010 expressed concerns about jailing employed obligors and tailored their sentences accordingly.¹⁴² The 2013 outcomes reflect a more consistent policy of avoiding incarceration of employed obligors throughout the thirteen counties included in the study.

That the largest proportion of jail-avoiding outcomes in 2013 took the form of postponed or suspended sentences,¹⁴³ rather than the no-contempt rulings that were favored in 2010, may be further evidence of an increased focus on programmatic objectives. A contempt ruling enforced by a postponed or suspended sentence preserves both the obligor's income stream and the court's ability to assure that income is translated into support for the child.¹⁴⁴

difficult to collect child support. One study found that incarceration results in 40 percent lower earnings upon release. Moreover, contact between the parent and child is severed, which, generally, is detrimental to the child.

139. Borrowing to make overdue support payments or to pay a purge is probably a fairly common practice, even though it may impair an obligor's ability to make future payments. Borrowing was specifically mentioned by two obligors in 2010, one of whom stated that a loan he had to take out "last time" had "turned into a problem." Borrowing to make child support payments is anticipated and even encouraged by judges, despite the potential negative long-term effects on the obligor's ability to make future payments. In 2013, for instance, one judge stated to an unemployed contemnor that if he could not pay the purge, he would have to borrow the money from a lender.

140. See Figure 12.

141. From here on, the term "employed" with reference to obligors or contemnors will be used to encompass all of the types of income streams referred to above.

142. One of these judges stated to an obligor, "I'd rather you be working than in jail." The other explained to a custodial parent, "If I put him in jail, he'll just lose his job and you'll lose that money." These two judges incarcerated only 4% of the employed obligors appearing before them. A contrasting perspective, which appeared to represent the majority view at that time was expressed by another judge, who twice stated that regardless of the obligor's sympathetic circumstances, the order must be enforced. This judge ordered incarceration of all seven obligors with an income stream who appeared before him.

143. If an unemployed contemnor with no known assets is given a postponed sentence, the effect is likely to be simply a delay in implementation of the jail sentence. For an employed obligor, however, a postponed sentence functions more like a suspended sentence, keeping incarceration at bay until the contemnor's next paycheck enables him to pay the court-ordered purge. In addition to using delayed sentences the 2013 courts continued two cases in order to avoid the loss of unemployment compensation benefits that would result if the obligors were jailed.

144. The tendency to use delayed sentences rather than no-contempt rulings in 2013, see Figure 12, may also reflect a merging of the programmatic focus on long-term income production and the earlier, more judicial, emphasis on "enforcement." A delayed sentence maintains the court's jurisdiction and its continuing ability to produce support for the child.

The increased reluctance to jail income-generating obligors represents a significant change in judicial practices between 2010 and 2013, as does the use of delayed sentencing to achieve this end. These changes were not mandated by any formal rule or directive. Most likely they are examples of how individual judges recalibrated their role in child support contempt proceedings in the new environment created by *Turner* and the pre-screening process.

Figure 12. Obligor with Existing Income Streams.

2010							
	No. of Obligor	Contempt holding		Continued	Sentences		
		No Contempt	Contempt		Jail	Postponed	Suspended*
Ongoing Employment**	50	33	15	2	5	5	5
New Job**	55	24	30	1	18	2	10
Reduced Hours	15	7	6	2	5	1	-
Unemployment Comp.	10	8	2	-	1	-	1
Workers' Comp.	2	1	-	1	-	-	-
Total	132	73	53	6	29	8	16
2013							
	No. of Obligor	Contempt holding		Continued	Sentences		
		No Contempt	Contempt		Jail	Postponed	Suspended
Ongoing Employment**	32	13	19	-	3	8	8
New Job*	14	4	10	-	3	2	5
Reduced Hours	2	-	2	-	-	1	1
Unemployment Comp.	4	1	1	2	-	-	1
Workers' Comp.	2	-	2	-	2	-	-
Total	54	18	34	2	8	11	15

* Includes "no sentence," of which there were two in 2010.

** Does not include marginal or sporadic employment.

E. Summary of Findings Related to the Pathways by Which Change Occurred

The *Turner* Court held that a delinquent child support obligor does not have a right to counsel in a civil contempt proceeding that can result in his incarceration.¹⁴⁵ However, the denial of the right to counsel was contingent on the state's use of alternative procedures sufficient to assure the accuracy of the court's decisions concerning the obligor's ability to make the court-ordered payments.¹⁴⁶ The formal procedures implemented by South Carolina Court Administration in response to this mandate tracked a four-item list mentioned with approval by the *Turner* Court, which focused on notice, availability of opportunities for the obligor

145. *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

146. *Id.*

to provide information to the court, and specific judicial findings.¹⁴⁷ The changes required pursuant to this list were minimal, and had little effect on the conduct or outcome of the contempt hearings.

More significant effects were observed in the manner in which individual judges conducted hearings and are suggestive of judges' greater awareness of both the constitutional and programmatic implications of child support contempt hearings. These factors appear to have led to more thorough and perceptive questioning by the judges and, of particular importance, to judges' more frequent and creative use of delayed sentencing.

The administrative response to *Turner* also played a significant role in increasing the potential for accurate decision making by the court in civil contempt hearings. A key action of OCSE following *Turner* was to encourage its state counterparts to conduct more extensive screening of cases before referring them for a judicial hearing on contempt. The screening process implemented in South Carolina had the effect of substantially reducing the number of child support hearings, thus enabling courts to spend more time on the cases that remained on the docket.

This examination of the means by which changes were effected in response to *Turner*, and the impact of the various changes, demonstrates the importance of secondary actors in shaping the real-world effects of a Supreme Court decision and either minimizing or enhancing its impact.

VI. POTENTIAL EFFECTS OF 2017 OCSE REGULATIONS

Further indirect effects of *Turner* can be expected to result from new regulatory amendments promulgated by OCSE in 2017, subsequent to the conclusion of the studies reported herein.¹⁴⁸ One objective of these regulations is reduction of the "routine use" of civil contempt as a child support enforcement tool.¹⁴⁹ Civil contempt, the agency stated, should be reserved for "appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligation, but willfully fails to do so, and the purge amount or conditions are within the noncustodial parent's ability to pay or meet."¹⁵⁰

Despite the agency's emphasis on reducing the use of civil contempt, the new regulations affecting the contempt process itself are somewhat limited. Like the alternative procedures approved by the *Turner* Court, they focus on assuring that the obligor is fully aware of the critical importance of "inability to pay" as a defense against both a contempt ruling and a jail sentence, and that the court has complete information relevant to deciding "ability to pay" issues.¹⁵¹

147. *Id.*

148. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 81 Fed. Reg. at 93,492. The effective date for the new rule was January 19, 2017, though the date on which state compliance is required varies for the various sections of the rule.

149. In addition to the counter-productiveness of incarceration, OCSE points to the expense associated with contempt actions, the substantial expense of incarceration, and the limited child support recovery associated with widespread use of civil contempt as an enforcement tool. 81 Fed. Reg. at 93,533–34.

150. 81 Fed. Reg. at 93,532.

151. *See* 45 C.F.R. § 303.6 (2017).

The regulations seek to give greater force and substance to the alternative procedures. Unlike the *Turner* Court, however, OCSE has limited authority to impose mandates directly on the courts. Consequently, the regulations attempt to affect judicial actions by expanding the role of state and local child support agencies in the contempt process.¹⁵² For instance, *Turner* directed courts to provide obligors with clear notice that ability to pay is the critical question in a civil contempt proceeding. The regulations direct that agencies also provide such notice.¹⁵³

Another of *Turner*'s directives to the courts, that they develop forms and processes for gathering from obligors information indicative of their ability to pay, is also replicated as a mandate to agencies in the new regulations. The regulations require that agency screening processes gather a wide range of information related to the obligor's ability to pay both the support award and any purge that might be ordered and provide this information to the courts to inform their decision making.¹⁵⁴ Regulations such as these may lead to modifications in South Carolina's screening process. The most important change that would appear to be called for by these regulations is an expansion of the types of cases that are subject to administrative pre-screening.

Otherwise, it is unclear whether the new regulations of the contempt process will effect significant changes in South Carolina's contempt hearings. A form of the sort required by the regulations is already in use in South Carolina's pre-screening process, and this form is provided to the court if a screened case goes to judicial hearing. Review of these forms by the judges was observed by the USC researchers. However, many of the cases heard by the courts were excluded from the screening process and hence no form of this type had been completed.

In the long run, the new regulations may have their greatest effect on preventing incarceration of indigent obligors through measures to achieve what is called "right-sizing" of child support awards—that is, assuring that awards of

152. The proposed regulations included more explicit mandates, such as requirements that agency procedures ensure that purge amounts take into consideration actual earnings and income and subsistence needs of the obligor, and that purge amounts be based on a written evidentiary finding that the obligor has the actual means to pay the amount from his or her current income or assets. Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 79 Fed. Reg. 68,548, 68,581 (Nov. 17, 2014). However, these provisions were excised from the final version because of agencies' lack of authority to regulate judicial activity. 81 Fed. Reg. at 93,532–33.

153. 81 Fed. Reg. at 93,564 (to be codified at 45 C.F.R. 303.6(c)(4)(i)–(ii)). As the judicial notice on this issue is often cursory, this requirement may result in obligors having a greater understanding of the significance of the "ability to pay" factor, both in regard to the contempt finding and the choice of sanction, and of the means for meeting their burden of proof on this issue. However, the extent to which obligors benefit from this information is uncertain if they are unassisted and unguided by a knowledgeable person in marshalling and presenting relevant evidence, particularly in light of the lack of credibility that many court personnel afford to obligors' statements about their financial situation and their difficulties finding work. OCSE mentions the difficulties that some agency and court personnel have "acknowledging the reality of chronic unemployment and adults with no or very low actual income." 81 Fed. Reg. at 93,525. This was borne out by our researchers' conversations with court personnel who referred dismissively to obligors' explanations of their financial and employment difficulties as "excuses," even in times of record unemployment.

154. 81 Fed. Reg. at 93,564 (to be codified at 45 C.F.R. §§ 303.6(c)(4)(i)–(ii)). The rule makes specific reference to information relevant to determining the obligor's ability to pay a purge or comply with other purge conditions.

support realistically reflect the obligor's ability to pay.¹⁵⁵ The new regulations require the implementation of guidelines and processes to assure that child support awards are based on the obligor's earnings, income, and other evidence of ability to pay¹⁵⁶ and that they take into consideration his basic subsistence needs.¹⁵⁷

In the hearings observed in South Carolina, it was common to see obligors who had jobs that were suitable to their skill level, but which did not generate sufficient income to pay the full amount of the support award, much less the living expenses of the obligor. Also common were arrearages of thousands of dollars that had been accrued by obligors with limited education, skills, or job prospects.¹⁵⁸ These findings suggest that many contempt cases are the product of unreasonably high child support awards. The "right-sizing" of awards could thus result in a long-term reduction in the number of noncomplying obligors, with accompanying reductions in the number of low-income obligors who face imprisonment because of their inability to pay court-ordered support.

Further, assuring that the child support award is set at a level that the obligor can reasonably afford to pay will restore to the proper forum the assessment of the disparate factors that go into determining an obligor's ability to pay. The court that hears a contempt action does not have the power to modify the support order but that is in effect what it is asked to do. When a support award is beyond the obligor's means, then it falls to the contempt judge to modify the order in a piecemeal fashion by holding in one or more contempt proceedings that the obligor's nonpayment was not willful. If the awards themselves are set at a level that accurately reflects the obligor's ability to pay, not only will the number of contempt hearings diminish, but those that remain will present fewer of the types of problems described herein.

VII. CONCLUSION

The study conducted in South Carolina and reported on herein examines the conduct and outcomes of civil contempt proceedings involving delinquent child support obligors. The object of the study was to determine whether low-income obligors' limited financial means were being adequately assessed in the evidentiary stage and taken into account in the sentencing stage. The fundamental finding of the study was that they were not. Close to 70% of indigent (or

155. See 42 C.F.R. § 303.4(b); 81 Fed. Reg. at 93,516–17. Child support awards are set in separate proceedings predating contempt hearings, and the court hearing a contempt case does not have authority to modify the support award. See, e.g., *Morgan v. Morgan*, 704 S.E.2d 764, 766–67 (2011); *Gilbert v. Hornack*, No. 2015–UP–104, 2015 WL 918519, at *1 (S.C. App. Mar. 4, 2015).

156. The failure of child support awards to reflect actual ability to pay is discussed in *Patterson*, *supra* note 11, at 107–12.

157. 81 Fed. Reg. at 93,562 (to be codified at 45 C.F.R. § 302.56(c)); *id.* at 93,563–64 (to be codified at 45 C.F.R. § 303.4(b)). The regulations also include provisions aimed at facilitating modification of support orders when circumstances change, particularly in the event of the obligor's incarceration. *Id.* at 93,564 (to be codified at 45 C.F.R. § 303.8(b)(2), (7)).

158. *Patterson*, *supra* note 11, at 106–07. Particularly in South Carolina, with its automatic initiation of contempt proceedings, see *supra* p. 82, these persons are doomed to repeated contempt charges, each carrying the possibility of a jail sentence. See, e.g., *Turner v. Rogers*, 564 U.S. 431, 436 (2011) (noting that the case before the Court was the sixth time that Turner had been held in contempt for nonpayment of support).

unemployed) obligors were held in contempt and received jail sentences in both 2010 and 2013.

Between the two phases of the study, the U.S. Supreme Court in *Turner v. Rogers* held that incarceration of a civil contemnor for nonpayment of child support is permissible under the constitution only if procedures are in place to assure that an accurate determination is made concerning the obligor's ability to make the court-ordered payments. The Court held that the procedures in *Turner*, which were generally representative of those used in child support contempt hearings throughout the state, fell short of this standard and thus deprived Turner of his rights under the Due Process Clause.

In response to the *Turner* decision, certain formal alterations in contempt processes related to notice, use of financial declaration forms, and judicial findings were made by South Carolina Court Administration. In addition, a pre-screening process was instituted that allowed for diversion of contempt cases from the judicial pipeline without a hearing before the judge. Analysis of the data gathered in the second phase of the study, which involved observation of hearings occurring after these developments, assessed the extent to which the nature or outcomes of the hearing had changed, the source of those changes, and whether they affected the accuracy and appropriate utilization of determinations concerning obligors' ability to pay.

The direct effects of the *Turner* holding were minimal. The basic due process holding, that contempt processes must be sufficient to assure an accurate determination on the "ability to pay" issue, might have resulted in meaningful changes. However, by approving the fairly limited list of procedures proffered by the federal government, the Court provided states that were so inclined with a minimalist way to comply with its ruling that fell short of assuring an accurate "ability to pay" determination. South Carolina took this approach, and the study found no evidence that compliance with these "alternative procedures" resulted in more accurate decision-making concerning ability to pay.

The *Turner* decision did bring about positive changes in child support contempt hearings and their outcomes in South Carolina. However, these effects were more indirect and involved secondary actors who responded to the fundamental ideas expressed in *Turner*. Specifically, the *Turner* opinion raised the awareness of individual judges who presided over child support contempt proceedings and made adjustments in their conduct of the hearings and the sentences that were handed down. In addition, OCSE responded to the *Turner* opinion by encouraging states to, among other things, expand processes for pre-trial screening of cases so that contempt hearings would occur only in cases of willful nonpayment of support.

Some of the more important changes that are attributable to the responses of individual judges and administrative agencies include: (1) longer duration of hearings, allowing for more extensive questioning and fact-finding by the judges, (2) judicial questioning that was more focused on the obligor's employment history and prospects and other matters related to ability to pay, (3) more creative sentencing practices, particularly the use of delayed sentences that enabled contemnors to maintain their current employment while they complied with purge conditions over time, and (4) increased use of non-monetary purge conditions. As a result of changes such as these, the number of obligors held in contempt dropped

by almost half in 2013, and the number of jail sentences that were immediately implemented also dropped sharply.

However, it did not appear that these changes increased the accuracy of decisions concerning ability to pay or altered the outcome in cases where the obligor lacked ability to pay. The rate at which indigent (unemployed) obligors were held in contempt remained the same in 2013 as in 2010. Further, the purge amounts for indigent (unemployed) contemnors appear to have often been set beyond their ability to pay, thus negating the assumption that they “held the keys to the prison in their own pockets.”

The belief underlying the ruling in *Turner*, that an unrepresented low-income obligor could be adequately protected from unlawful incarceration by alternatives to legal representation such as those approved by the Court, has not been borne out. However, the contempt proceedings observed in this study generally fall into the category which the Court recognized might require further protections to prevent wrongful imprisonment of contemnors, including a right to counsel. That is because they are state-prosecuted and state-dominated proceedings in which the unsophisticated and unrepresented obligor faces a bevy of representatives of the state, including lawyers and court personnel, who will both present and decide the case against him. It does not appear that South Carolina will institute additional protections without a definitive Supreme Court ruling on the matter. Under these circumstances, as OCSE appears to have concluded, the best way to protect obligors who are unable to pay is through the use of administrative identification and diversion.

The ability of the South Carolina child support agency, and indeed of the courts themselves, to institute or experiment with processes that more adequately protect the due process rights of child support obligors who are delinquent in their child support payments or have been charged with contempt is limited by Family Court Rule 24. Modification of this rule is needed in order to create the flexibility needed to fashion responses to nonpayment of child support that will be more effective both in protecting obligors’ due process rights and in producing long-term support for the obligors’ children.

